

RECEIVED
NOV 21 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1307602
Unpublished Opinion No. 2018-UP-349
(S.C. Court of Appeals Filed August 1, 2018)
Appellate Case No. 2018-001866

Verma Tedder,

Claimant/Petitioner,

v.

Darlington County Community Action
Agency, Employer, and State Accident Fund,

Respondents.

**RETURN TO PETITIONER'S PETITION FOR A WRIT OF
CERTIORARI**

G. Murrell Smith, Jr.
SC Bar No. 66263
LEE, ERTER, WILSON, HOLLER &
SMITH, L.L.C.
Post Office Box 580
Sumter, South Carolina 29151
(803) 778-2471
Attorney for Respondents

Other Counsel of Record:
Stephen J. Wukela
Wukela Law Firm
Post Office Box 13057
Florence, South Carolina 29504
(843) 669-5634
Attorney for Petitioner

INDEX

COUNTERSTATEMENT OF THE ISSUE PRESENTED..... 1
COUNTERSTATEMENT OF THE CASE..... 1
ARGUMENTS AND AUTHORITIES..... 4
I. THE COURT OF APPEALS PROPERLY AFFIRMED THE
EXCLUSION OF PETITIONER’S VOCATIONAL EVALUATION
AND THIS COURT SHOULD DENY PETITIONER’S REQUEST
FOR A WRIT OF CERTIORARI 4
CONCLUSION 9

COUNTERSTATEMENT OF THE ISSUE PRESENTED

- I. DID THE COURT OF APPEALS PROPERLY AFFIRM THE EXCLUSION OF PETITIONER'S VOCATIONAL EVALUATION WHERE SHE REFUSED TO SUBMIT TO A VOCATIONAL ASSESSMENT BY RESPONDENTS' EXPERT, AND WHERE SHE WAS WARNED OF THE CONSEQUENCE OF HER FAILURE TO COOPERATE?**

COUNTERSTATEMENT OF THE CASE

This is an admitted accident case decided by the Workers' Compensation Commission on a Form 21 filed September 5, 2014. While originally claiming injury to her right arm, right hand, right knee, left leg, and back, Petitioner ultimately abandoned all of her claims except for the injuries to her left knee and lower back. Following a surgery on her left knee and follow-up physical therapy, her authorized provider, Dr. Elvington declared her to have reached maximum medical improvement as of August 26, 2014, assigned her a three percent permanent physical impairment to her left knee, and released her with no restrictions. (ROA pp. 276-304). At about the same time, Petitioner was seen by Dr. Edwards in follow up for her low back pain. He declared her to be at maximum medical improvement as of July 3, 2014, assigned her five percent impairment rating, and released her with no restrictions. (ROA p. 358).

Petitioner was then referred by her attorney to Tracy Hill, P.T., of Columbia Rehabilitation Clinic, Inc. for a Functional Capacity Evaluation ("FCE") on September 12, 2014. Hill noted that "a five position hand grip test was performed and graph results did not resemble a bell-shaped curve indicating sub-maximum efforts. Coefficients of variation at position 2 of the right hand were above 15% indicating sub-maximal effort..." Petitioner repeatedly self-limited throughout the testing, which she herself – not the evaluator – ultimately terminated based on her own

subjective complaints of pain. (ROA pp. 370-392).

Petitioner also underwent a Vocational Evaluation by J. Adger Brown on September 19, 2014. She refused to submit to evaluation by Respondents' Vocational expert and so both the Single Commissioner and Commission refused to consider her expert's report.

At the hearing before the Single Commissioner, Petitioner "ambulated laboriously" with a cane though no doctor had prescribed her a cane and her pre-surgery notes indicated she had only a "mildly antalgic" gait, and later, had a "normal" gait. (ROA pp. 248-266 and ROA pp. 326-366).

The Panel in its Decision and Order concurred with the Single Commissioner regarding Petitioner's substantial credibility problems, noting that "Claimant did not make a good witness on her own behalf," referring to the Single Commissioner's note of the same finding based on the Commissioner's observations of Petitioner's demeanor and testimony at the hearing. Specifically, the Panel's Order noted that Petitioner had previously "completed and/or signed a form in which she denied any prior workers' compensation claims or impairment ratings." (ROA p. 29, Finding 19(c)). In fact, Petitioner had filed a previous worker's compensation claim for injuries to her right knee, for which an impairment rating was assigned and for which she received a settlement, as well as a prior personal injury lawsuit for injuries to her back, which was likewise settled. (ROA p. 28, Finding 8).

Respondents filed a Form 21 on September 5, 2014 to stop payment to Petitioner for Temporary Total Disability ("TTD"). (ROA p. 35). The Commission scheduled a hearing on October 29, 2015. Petitioner then filed a Form 58 claiming for the first time that she is totally and permanently disabled. (ROA p. 232). As a result, the Commission notified the parties that mediation would be required pursuant to S.C. Reg. 67-1802. The October hearing was continued to permit mediation. (ROA p. 237). The parties mediated on February 23, 2015. Thereafter, the

hearing date was rescheduled for May, but then was continued based on scheduling conflicts of counsel, each time with the consent of all parties including counsel for Petitioner. (ROA p. 30).

While the mediation and hearings were pending scheduling, Petitioner scheduled additional assessments with experts of her choice. In addition to participating in a Functional Capacity Evaluation which showed sub-maximal effort on her part and self-limiting throughout the testing, (ROA pp. 370-392), she also underwent a Vocational Evaluation to support her claim for permanent and total disability. Respondents received these reports as part of Petitioner's April 17, 2015 submissions. In response, Respondents requested that Petitioner submit to evaluation with their Vocational Expert. After weeks of Petitioner refusing to cooperate with Respondents' request, Respondents filed a Motion to Compel her to submit to a Vocational Evaluation with their expert. (ROA pp. 410-413). On August 7, 2015, the Commission responded by denying Respondents' Motion but warning Petitioner that "if Claimant chooses not to submit to Defendants' evaluation, neither party's Vocational Report will be considered by the undersigned Commissioner." (ROA p. 1).

Petitioner elected not to submit to evaluation by Respondents' expert, and instead, at the hearing on August 20, 2015, before the Single Commissioner, asked that the Commissioner reconsider her ruling regarding the Vocational Evaluation which the Commissioner denied based, in part, on Petitioner's "myriad of credibility issues." (ROA p. 19, Finding 21.)

Following the submission of evidence and the hearing, the Single Commissioner found Petitioner sustained a ten percent permanent partial disability to left knee, an eight percent permanent partial disability to her back and found that Petitioner is not permanently and totally disabled under either S.C. Code § 42-9-10 or § 42-9-30(21). She ordered a total of 43.5 weeks of compensation for the injuries. The Commissioner further ordered that Respondents are entitled to

credit back for the TTD payments made since they filed the Form 21 on September 8, 2014.

Petitioner appealed the Single Commissioner's ruling to the Appellate Panel. Following a February 22, 2016 hearing and its *de novo* review of the facts, the Panel issued its Order on April 20, 2016. The Panel concurred with and affirmed the decision of the Single Commissioner. Dissatisfied, Petitioner appealed to the South Carolina Court of Appeals.

The South Carolina Court of Appeals affirmed the Panel in Unpublished Opinion No. 2018-UP-349 in all respects including on the issue of the exclusion of Petitioner's Vocational Report which the Court of Appeals deemed fair in light of Petitioner's refusal to submit to evaluation even after a warning from the Single Commissioner. The Court of Appeals denied the subsequent Petition for Rehearing. Again dissatisfied, Petitioner is now before this Court seeking a Writ of Certiorari to the Court of Appeals on the single question of the exclusion of her Vocational Report.

ARGUMENTS AND AUTHORITIES

I. THE COURT OF APPEALS PROPERLY AFFIRMED THE EXCLUSION OF PETITIONER'S VOCATIONAL EVALUATION AND THIS COURT SHOULD DENY PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI.

Both the Appellate Court Rules and this Court's precedent make clear that certiorari review is the exception, not the rule, and that it is only available in cases that present unique or meaningful issues. *See, e.g., State v. Lyles*, 381 S.C. 442, 443-44, 673 S.E.2d 811, 812 (2009) (emphasizing that certiorari review is available "only where special reasons justify the exercise of that power"); Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). This case falls far short of this high threshold.

The Rule provides only certain issues warrant discretionary review, including:

- (1) Where there are novel questions of law;
- (2) Where there is a dissent in the decision of the Court of Appeals;
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
- (4) Where substantial constitutional issues are directly involved;
- (5) Where a federal question is included and the decision of the Court of Appeals

conflicts with a decision of the United States Supreme Court;

Id. Here, there are no novel questions of law. There was no dissent in the Court of Appeals. The Court of Appeals decision does not conflict with prior controlling precedent. And there are no federal questions presented. The only possible basis for additional review would be if substantial constitutional questions were directly involved.

Despite Petitioner's attempt to couch the question presented as if there had been some finding of a statute's unconstitutionality, in fact, the Court of Appeals decision merely construes the application of existing South Carolina law as having been done in a fair way and in keeping with traditional notions of due process and fundamental fairness.

Here, the Court of Appeals correctly applied the substantial evidence standard of review from *Clemmons v. Lowe's Home Ctrs., Onc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017) to find the Appellate Panel's decision supported by substantial evidence and to conclude that there were no errors of law affecting the Panel's decision. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (citing *Stone v. Traylor Bros., Inc.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004)). In doing so, the Court of Appeals agreed that the Commission properly excluded Petitioner's Vocational Report because she refused to undergo evaluation by

Respondents' expert.

Petitioner claimed that simply because she provided her hired expert's report to Respondents more than the ten days ahead of the scheduled hearing as required by S.C. Reg. 67-612(B)(2), neither the Single Commissioner nor the Panel had any discretion to exclude it as a sanction for her failure to submit to evaluation by Respondents' expert. Respondent's cursory argument ignored the well-settled law that administrative agencies are required to meet minimum standards of due process. *Smith v. South Carolina Dep't of Mental Health*, 329 S.C. 485, 494 S.E.2d 630 (S.C. Ct. App. 1997), and that "due process at least requires an opportunity to present favorable witnesses." *Id. citing Brown v. South Carolina State Bd. of Educ.*, 301 S.C. 326, 391 S.E.2d 866 (1990); *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987).

Respondents retained their own Vocational Expert two months prior to the final hearing to evaluate Petitioner's report and perform their own independent evaluation. Petitioner ignored repeated requests for her to be evaluated, and, even after the Single Commissioner warned her that her refusal to submit to evaluation would result in her expert's report being excluded, she continued to refuse to cooperate or be evaluated by Respondents' expert. Had the Commissioner and Appellate Panel considered Petitioner's expert's report, Petitioner would have been rewarded for her obduracy in refusing to cooperate and ruling with Petitioner on that issue would not have been in keeping with traditional notions of fair play and due process. Both the Single Commissioner and Appellate Panel rightfully disregarded the conclusions of Petitioner's Vocational Report as a sanction for her failure to comply and the Court of Appeals agreed *citing Smith v. S.C. Dep't of Mental Health*, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997) (citing S.C. Const. art. 1, § 3).

Specifically, the Court of Appeals correctly construed the ten days' notice requirement from S.C. Code Ann. Regs. 67-612(B)(2) (2012) as being a prerequisite to admissibility and not as establishing admissibility as a matter of right. Indeed, the Court of Appeals correctly ruled that the regulation is, "merely a prerequisite to the admission of an expert's report into evidence and does not take away the single commissioner's authority to exclude such a report for other reasons." (Ct. App. Order at pg. 2). To hold otherwise would mean that any purported expert opinion offered by a claimant, if served with ten days' notice, would automatically be admissible regardless of whether the Commission found it inadmissible for other reasons. *See e.g., Gadson v. Mikasa Corp.*, 368 S.C. 214, 228, 628 S.E.2d 262, 269 (Ct. App. 2006) ("the admissibility of the expert's testimony are matters within the trial court's sound discretion"). The rulings on this issue by the Single Commissioner, the Appellate Panel, and the Court of Appeals are all practical, rational, and in keeping with traditional notions of fair play and substantial justice.

Moreover, even if this Court were to disagree with the lower courts on this single point, the failure of the Commission to consider the Vocational Report was harmless as the report was neither controlling nor supported by any of the other medical evidence in the record. Expert testimony is to be considered like any other testimony. *Tiller v. Nat'l Health Care, Ctr. Of Sumter*, 334 S.C. 333, 340, 513 S.E. 2d, 843, 846 (1999). While medical testimony is entitled to great respect, it should not be held conclusive irrespective of other evidence and the fact finder may disregard it if the record includes other competent evidence. *Id.* at 340, 513 S.E. 2d at 846. Petitioner's own medical providers demonstrate that post-surgery and physical therapy, she had no work restrictions as found by the Vocational Expert. The August 26, 2014 Addendum by Dr. Elvington does not mention any permanent work restrictions (ROA p. 360). Furthermore,

Petitioner's Vocational Expert opined "that it is her back that is most painful and most limiting." (ROA p. 398). Yet, Petitioner's authorized treating physician, Dr. Edwards, noted in his exam in which he found her to be at maximum medical improvement that was a "pleasant female in no acute distress, rises easily from sitting to standing; decreased lordosis; reluctant to reverse lordosis without forward flexion; returns upright with muscular dysrhythmia; motor strength in the lower extremities is 5 of 5; reflexes are 2 plus and symmetric; hip motion is full and painless; peripheral pulses full; no dermatol paresthesias; no sciatic stretch signs; no long track findings and gait is normal." (ROA p. 358). Dr. Edwards further interpreted the MRI Petitioner's spine as showing (a) no stenosis or other abnormality, (b) "no serious pathology," (c) no compressive pathology; (d) no need for surgical intervention or invasive treatment; and (e) no need for restrictions. (ROA pp. 357-358). The overwhelming evidence is that Petitioner is not permanently and totally disabled as a result of her admitted injury of March 29, 2013, and, even if Petitioner's Vocational Expert's report had been admitted and considered, it would not have materially changed the findings of the Panel. Therefore, its exclusion, even if error is harmless and should not justify the reversal of the Commission's findings.

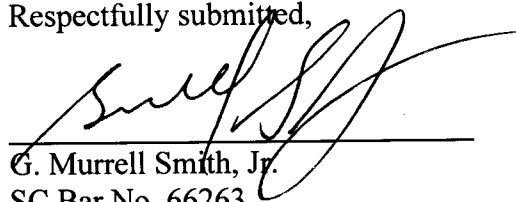
Again, there is no "special reason" justifying this Court review of the Court of Appeal's quite ordinary and straightforward application of existing South Carolina law. All of the arguments made by Petitioner constitute mere recitation of her arguments made in the written briefs and in oral arguments before the Court of Appeals. Petitioner merely disagree with the Court of Appeals' application of established law to the facts of this case and are seeking review upon that basis. There is no novel question of law, dissenting opinion, or significant constitutional consideration. Therefore, there is no proper basis for the issuance of a writ of

certiorari and the Court should deny the Petition.

CONCLUSION

For the reasons stated, Respondents request that this Court deny Petitioner's Request for a Writ of Certiorari to the South Carolina Court of Appeals.

Respectfully submitted,



G. Murrell Smith, Jr.

SC Bar No. 66263

LEE, ERTER, WILSON, HOLLER & SMITH, L.L.C.

Post Office Box 580

Sumter, South Carolina 29151

(803) 778-2471

(803) 778-1643 (facsimile)

murrell@leeandmoise.com

Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No. 1307602

Appellate Case No. 2018-001866

RECEIVED
NOV 21 2018
S.C. SUPREME COURT

Verma Tedder.....Claimant/Petitioner,

Vs.

Darlington County Community Action
Agency, Employer and State Accident Fund.....Respondents.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of the Sumter County law firm of Lee, Erter, Wilson, Holler & Smith, LLC, attorneys for the Respondents, do hereby certify that I have this 19 day of November, 2018, served a copy of the RETURN TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI by personally depositing the same in the U.S. Postal Service addressed to:

Stephen J. Wukela
Wukela Law Firm
Post office Box 13057
Florence SC 29504

G. MURRELL SMITH, JR.
Attorney for Respondents